No. 92-1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

HEALTH CARE & RETIREMENT CORPORATION OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN HEALTH CARE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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CONSENT TO FILING

This *amicus curiae* brief is filed pursuant to Supreme Court Rule 37.3, with the written consent of all parties in interest. Letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The American Health Care Association ("AHCA") is an organization of thousands of nursing care facilities throughout the United States. The AHCA is deeply concerned about the issue in this case – that the National Labor Relations Board

("the NLRB" or "the Board") has applied an incorrect interpretation of the definition of "supervisor" under the National Labor Relations Act ("the Act"). The Board's "patient care proviso," discussed below, has made it virtually impossible for the AHCA's member facilities to have the loyal supervisory staffs long inherent in the Act's statutory scheme. The Court's opinion in this case will therefore potentially affect each of the AHCA's member facilities.

SUMMARY OF ARGUMENT

Section 2(11) of the National Labor Relations Act provides a clear definition of "supervisor." 29 U.S.C. 152(11). The statute provides twelve indicia of supervisory authority, the possession of any one being sufficient to establish supervisory status.

Notwithstanding clear statutory language, the Board has created a new legal standard to be applied *only* in the context of health care. There is no justification for such an extra-statutory legal standard, either as a matter of law *or* policy.

When Congress enacted Section 2(11) in 1947, it was mindful that, by virtue of greater skill and experience, certain employees might appear to have greater authority than coworkers. These individuals (often referred to as "lead men" or "straw bosses") might appear to some to be minor "supervisors." Congress made it clear that these individuals did not satisfy the statutory criteria for supervisory status. The Board's decision adhered to this concept.

In 1974, Congress enacted the Health Care Amendments to the National Labor Relations Act. At that time, the American Nurses Association ("the ANA") (and other labor organizations) lobbied Congress to specifically exclude from the ambit of Section 2(11) those activities of nurses that pertained to patient care. Congress specifically declined to do so, noting with approval the Board's application of the traditional "straw boss" analysis to the health care industry. Congress directed the Board to continue to interpret the statute accordingly.

In the aftermath of the 1974 amendments, the Board began to depart from the traditional analysis and create new standards to be applied only in the health care industry. This new approach emerged gradually, and was formally identified only after repeated urgings by courts of appeals. The Board has admitted, as recently as several days ago, that it has created a separate rule of law for the health care industry. Indeed, after the Board submitted its brief to this Court in this matter, it actually *overruled* landmark pre-1974 cases to which *Congress directed the Board to adhere.*

The Board's current approach is an insupportable departure from the clear language of the statute — one which singles out health care as the only industry for which higher standards must be met to establish supervisory status. Such an approach is inappropriate as a matter of law. It also has very unfortunate policy ramifications. Nursing homes care for a large number of aged and infirm individuals. The need for accountable supervision of primary care givers should be self-evident. The effect of the Board's extra-statutory rule has been to deprive many nursing homes of on-site first line supervision.

Finally, should this departure by the Board be condoned, the way would clearly be paved for the Board to grant non-statutory exemptions from Section 2(11) to unions and interest groups seeking to represent first-line supervisors in other industries.

ARGUMENT

A. The Board Has Departed From The Traditional Statutory Standards That Congress Intended To Govern Supervisory Status Determinations

As originally enacted, the Act contained no definition of "supervisor." Act of July 5, 1935, ch. 372, 49 Stat. 449. Recognizing that "*management, like labor, must have faithful agents,*" H.R.Rep. 245, 80th Cong., 1st Sess. at 16 (1947) (emphasis in original), Congress, as part of the Taft-Hartley Amendments in 1947, enacted a statutory exclusion for supervisors. Labor Management Relations Act, Ch. 120, Title I, 61 Stat. 137-138

(codified at 29 U.S.C. 152(3)).[1] Under the Act, a "supervisor" is defined as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. §152(11).[2]

Congress recognized that corporate "personnel departments" were often responsible for carrying out actions that bore upon the statutory criteria. Hence, the duty to utilize independent judgment in the direction of employees was considered an important factor by which to evaluate the status of first-line supervisors.[3] The words "or responsibly to direct" employees were specifically added to the statute in recognition of management

[1] Congress foresaw that the loyalty of managers may be "divided" if both supervisors and employees were unionized. H.R. Rep. 245, 80th Cong., 1st Sess., at 16 (1947). Congress also recognized divided loyalty could interfere with the assignment of "people to their work, to see they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, . . ." *Id.*

[2] The Board has repeatedly stated that the statutory indicia set forth in Section 2(11) of the Act must be read in the *disjunctive*. *Albany Medical Center Hospital, 273 NLRB 485, 486 (1984); Newspaper Guild, Local 187 (Times Publishing Co.)*, 196 NLRB 1121, 1122 (1972), *modified on other grounds*, 489 F.2d 416 (3d Cir. 1973). Therefore, *"only one need exist to confer supervisory status."* 273 NLRB at 486 (emphasis added). Moreover, under Board law, the mere *possession* of supervisory authority — whether or not it is actually exercised — satisfies the statutory criteria. *Atlanta Newspapers*, 263 NLRB 632 (1982); *Exeter Hospital*, 248 NLRB 377, 378 (1980).

[3] 93 CONG. REC. 4804 (statement of Sen. Flanders), *reprinted at* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, at 1303 (1947).

custom.[4] Congress intended that individuals exercising such "responsible direction" would be "above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees.'"[5]

The "straw boss analysis" does not involve a separate "test" or legal standard.[6] It simply is recognition of a common situation typically involving employees who achieve a certain status by virtue of having "moved up through the ranks", but *do not satisfy the statutory definition of "supervisor."* A "straw boss" therefore is *not* an "exception" to the supervisory criteria set forth in Section 2(11); rather, he or she is one who perhaps *comes close* to satisfying the statutory criteria but does not.

Contrast this with the Board's current approach to supervisory status in health care. The Board has stated that if

> some authority exists which in other contexts would be found to bestow supervisory status, *the qualitative nature of this authority must be subjected to a second-step analysis* in order to determine the ends for which

[4] *Id.*

[5] *Id.*

[6] Congress understood that the individual who satisfies the statutory definition must be distinguished from the "straw bosses, leadmen, set-up men, and other minor supervisory employees". S. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947). The minimal authority of a "lead person" or "straw boss" typically derives from greater training, skill or experience, and was not truly "supervisory" in nature. 93 CONG. REC. 4804 (statement of Sen. Flanders), *reprinted at* 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947, 1303 (1947). Indeed, before *and* after the Taft-Hartley Amendments, the Board recognized that individuals whose authority arose merely from greater skill or experience were not truly "supervisory." *See Bethlehem - Sparrows Point Shipyard, Inc.*, 65 NLRB 284 (1945); *Pittsburgh Equitable Meter Company*, 61 NLRB 880 (1945); *Richards Chemical Works, Inc.*, 65 NLRB 14 (1945); *Endicott-Johnson Corp.*, 67 NLRB 1342, 1347 (1946); *George Ehlenberger & Co.*, 77 NLRB 701, 703 (1948); *Greystone Knitwear Co.*, 136 NLRB 573 (1962), *enf'd*, 311 F.2d 794 (2d Cir. 1963); *Becker County Sand & Gravel Co.*, 157 NLRB 557 (1966), *enf'd*, 373 F.2d 528 (4th Cir. 1967).

> it is exercised. Thus, *acts which would ordinarily be supervisory may, in the health care context, indicate no more than the exercise of technical or professional judgment.*

Beverly Manor Convalescent Centers, 275 NLRB 943, 946 (1985) (emphasis added). Clearly, the Board created a new test *specifically for health care*. It has done so despite repeatedly acknowledging that it is required to apply the "traditional standards," and the "straw boss" doctrine. *Id.* at 946-947. Moreover, the Board wrongly stated this new test was a "dictate of congressional intent." *Id.* As discussed below, nothing could be further from the truth.

B. In 1974 Congress Affirmatively Refused To Amend Section 2(11) To Exclude Nurses From The Definition Of "Supervisor"

In the debates that culminated in the 1974 amendments to the Act (the "Health Care Amendments"), various interest groups urged Congress to amend Section 2(11) to specifically exclude nurses and other health care professionals. Under a proposal urged by the American Nurses Association, "[a] registered nurse *should not be deemed a supervisor when exercising independent professional judgment.*" *Coverage of Nonprofit Hospitals Under The National Labor Relations Act, 1972: Hearings on H.R. 11357 Before The Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong., 2d sess. 19 (1972) ("Senate Hearings on H.R. 11357") (emphasis added); *see also Extension Of NLRA To Nonprofit Hospital Employees: Hearings On H.R. 1236 Before The Subcommittee On Labor Of The House of Representatives Committee on Education And Labor*, 93d Cong., 1st sess. 18 (1973).

The amendment proposed by the ANA was rejected.[7] The Senate Committee that reported out the bill which ultimately passed, explained:

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[7] Here, the ANA asserts that in the 1972 hearings before the House of Representatives, the ANA urged Representatives Ashbrook and Thompson (co-sponsors of the bill) to amend Section 2(11) specifically to eliminate registered nurses, *(Footnote continued)*

> Various organizations representing health care professionals have urged an amendment to Section 2(11) of the Act so as to exclude such professionals from the definition of "supervisor". The Committee has studied this definition with particular reference to health care professionals such as registered nurses, interns, residents, fellows, and salaried physicians and *concludes that the proposed amendment is unnecessary because of existing Board decisions.* The Committee notes that the Board has carefully avoided applying the definition of "supervisor" to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental to the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
>
> The Committee *expects the Board to continue evaluating the facts of each case in this manner when making its determinations.*

S. Rep. No. 766, 93d Cong., 2d sess. 6 (1974)(emphasis added). Congress thus specifically rejected efforts to amend Section 2(11), and was satisfied that Board law in 1974 accurately reflected congressional intent. Moreover, Congress expressly directed the Board to *continue to utilize the same principles it had always applied* in considering supervisory status in the health care industry.

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because registered nurses' patient care responsibilities *include* the necessary direction and assignment of others' work. Senate Hearings on H.R. 11357 at 17-18; ANA Brief at 9-12. Representative Thompson assured the ANA that even *absent* an amendment specifically exempting "registered nurses" from Section 2(11), the concerns of the ANA would be addressed. *Id.*

The short answer to this contention is: (1) the statutory language was *not* amended, and (2) the Board was directed to continue to apply the "straw boss" standard that it applied to all other industries. As discussed *infra* at pp. 13-19, the Board has failed to follow the direction of Congress and has instead administratively amended the Act.

Several important points emerge from the foregoing legislative history. First, the above-quoted portions of the 1974 Senate Report are the only express statements of congressional intent concerning the specific issue of supervisory status of health care professionals. There simply is no basis for the elaborate statements by the Board that purport to reflect "congressional intent." *See* Board Brief at 16-22; *Beverly Manor Convalescent Centers*, 275 NLRB at 945-946.

Second, to the extent that congressional intent may be *inferred* from the Health Care Amendments, the inferences do not support the Board's construction of Section 2(11). Indeed, by axiom of statutory construction, Congress clearly did *not* intend the Board to adopt as a rule of law a proposed amendment that Congress considered and *specifically rejected*. Yet, that is precisely what the Board has done.

Third, the Board ignores completely the congressional direction that it continue to make supervisory status determinations in the health care industry in the same case-by-case manner that it had prior to 1974. Incredibly, after the Board briefed the instant case, the Board actually *overruled* pre-1974 cases which Congress stated *accurately reflected legislative intent*. *See* pp. 19-20, *infra*. The pre-1974 cases, discussed below, make it clear that the Board has misconstrued Section 2(11) and congressional intent.

C. Before 1974, The Board Applied The Well-Established "Straw Boss" Standard In The Health Care Industry

In light of the foregoing, the "existing Board decisions" which Congress assessed when it decided against amending the Act in 1974 are worthy of examination. As discussed below, those cases applied the traditional "straw boss" analysis to the health care industry. They did *not* create a *new* standard which rendered non-supervisory in health care individuals who clearly would be supervisors in any other industry. There simply was no "special rule" for health care or for nurses.

1. The Direction By Nurses Of Employees In The Care Of Patients Was Held By The Board To Satisfy Section 2(11)

Before 1974, the NLRB held that supervising the work of nurses aides in the administration of patient care services qualified an LPN as a supervisor under the Act. *University Nursing Home, Inc.*, 168 NLRB 263 (1967). There, the Board found a Licensed Practical Nurse ("LPN"):

> supervises the work of three nurses' aides and one orderly in the performance of tasks of changing bed linens, bathing, feeding, massaging, and otherwise caring for patients in accordance with physicians' instructions .... She also carries out such orders and treatments as patients' doctors may prescribe .... As a charge nurse, [the LPN] reviews patients' charts to make certain that proper medications and diet have been and are being given, and observes and reports symptoms, if any to the head registered nurse. *We find that the licensed practical nurse is a supervisor within the meaning of the Act.*—

Id. at 265 (emphasis added).

Assigning patient care duties to nursing assistants was also indicative of supervisory status. *Autumn Leaf Lodge*, 193 NLRB 638, 638-639 (1971), *enf'd sub. nom. NLRB v. National Living Centers, Inc.*, 462 F.2d 575 (5th Cir. 1972). The Board also recognized that a nurse with the responsibility to direct non-supervisory personnel was a supervisor. *Rockville Nursing Center*, 193 NLRB 959, 962 (1971) *overruled, Northcrest Nursing Home*, 313 NLRB No. 54, slip op. at n.12 (Nov. 26, 1993). Assigning employees to patient rooms and designating the care to be given reflected supervisory authority. *North Dade Hospital, Inc.*, 210 NLRB 588, 592 (1974). These findings were not inadvertent. Indeed, the Board specifically explained *why* such duties were supervisory:

> In a nursing home servicing elderly and sick patients whose critical needs may momentarily require

variations in standard procedures, the nurse responsible for the supervision of other nurses or a shift or a section must obviously be prepared to exercise her discretion in utilizing her training and experience and assign and direct employees placed under her authority more than clerically or routinely. . . . Although the record does not establish that the nurses here in question hire, fire, or mete out discipline or directly recommend such action, their power to enforce major personnel policies and rules . . . is compelling evidence that their direction and assignment of employees is substantial and meaningful. . . .

[E]ach of the . . . nurses concerned was at all material times a supervisor, as defined in Section 2(11) of the Act because she had authority in the interest of the [employer] to "assign" and "responsibly to direct" other employees, as comprehended by that section.

Avon Convalescent Center, Inc., 200 NLRB 702, 706 (1972), *enf'd*, 490 F.2d 1384 (6th Cir. 1974),[8] *overruled, Northcrest Nursing Home*, 313 NLRB No. 54, slip op. at n.12.

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[8] Before the Health Care Amendments, the Board recognized that nurses' involvement in other "supervisory" functions under Section 2(11) established supervisory status, regardless of their connection to patient care. These included recommending employees for termination, *North Dade Hospital, Inc.*, 210 NLRB at 592; *Autumn Leaf Lodge*, 193 NLRB at 639; the power to discipline employees, *Rosewood, Inc.*, 185 NLRB 193, 194 (1970); the authority to enforce rules, and to "write up" nursing assistants for violations, *Avon Convalescent Center, Inc.*, 200 NLRB at 706; the ability to transfer employees to different jobs, *Autumn Leaf Lodge*, 193 NLRB at 639; *Sherewood Enterprises, Inc.*, 175 NLRB 354 (1969); the authority to permit employees to leave early, *New Fairview Hall Convalescent Home*, 206 NLRB 688, 749 (1973), *enf'd sub nom. Donovan v. NLRB*, 520 F.2d 1316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976), *Rosewood Inc.*, 185 NLRB at 194; excuse lateness, *New Fairview Hall Convalescent Center*, 206 NLRB at 749; adjust schedules or assign meal and break periods, *New Fairview Hall Convalescent Center*, 206 NLRB at 749; *Avon Convalescent Center, Inc.*, 200 NLRB at 706; adjust time cards, *New Fairview Hall Convalescent Center*, 206 NLRB at 749; the authority to call in employees to ensure staffing, *Garrard Convalescent Home, Inc.*, *(Footnote continued)*

2. Before 1974, Where The Board Held That Nurses' Direction Of Employees Was Not "Supervisory", It Applied The Correct Standard; One Which Differs Fundamentally From The One Utilized Today

In but *one* case prior to 1974 — and indeed, three years *before* the above quote in *Avon Convalescent Center* — did the Board find that nurses were *not* supervisors because their duties were "solely a product of highly developed professional skills." In that case, the Board found that the nurses' authority was simply "to inform other, lesser skilled employees as to the work to be performed for patients." *Sherewood Enterprises, Inc.*, 175 NLRB at 354. The "authority" of the nurse was therefore analogous to that of the non-supervisory "lead person" or "straw boss." *See also, Doctors' Hospital of Modesto, Inc.*, 183 NLRB 950, 951-952 (1970).[9]

The Board asserts here that its decision in *Doctors' Hospital of Modesto, Inc.*, was the "seminal" case creating its current test for supervisory status in the health care industry.[10] Board Brief

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199 NLRB 711, 717 (1972), *enf'd*, 489 F.2d 736 (6th Cir. 1974), *Rockville Nursing Center*, 193 NLRB at 962; and the preparation of employee evaluations. *New Fairview Hall Convalescent Center*, 206 NLRB at 749; *Sherewood Enterprises, Inc.*, 175 NLRB at 354. Where nurses adjusted employee grievances, they were deemed supervisors. *New Fairview Hall Convalescent Center*, 206 NLRB at 749. Higher pay than other employees was considered an indicia of supervisory status. *Sherewood Enterprises, Inc.*, 175 NLRB at 354. Where nurses were the highest ranking persons in the facility, the Board recognized them as supervisors. *Rockville Nursing Center*, 193 NLRB at 717; *Autumn Leaf Lodge*, 193 NLRB at 638-639. Nurses who attended in-service meetings concerning their supervisory duties were also considered supervisors under Section 2(11). *Avon Convalescent Center, Inc.*, 200 NLRB at 705.

[9] The Board also held a nurse was actually a "leadwoman" in *Abingdon Nursing Center*, 189 NLRB 842, 850 (1971) *enf'd*, 80 L.R.R.M. (BNA) 3232 (7th Cir. 1972).

[10] The Board implies that *Doctors' Hospital of Modesto, Inc., supra*, and *Sherewood Enterprises, Inc., supra*, are different cases. Board Brief at 17. In *(Footnote continued)*

at 17. This simply is not accurate. As the Ninth Circuit, on review of *Doctors' Hospital of Modesto, Inc.*[11] noted the Board simply applied the traditional "straw boss" analysis in the health care field:

> The leadman or straw boss may give minor orders or directives or supervise the work of others, but he is *not necessarily* a part of management and a "supervisor" within the Act. The fact that nurses are highly trained professionals and occasionally use independent judgment does *not necessarily* make them part of management or "supervisors" under the Act.

NLRB v. Doctors' Hospital of Modesto, Inc., 489 F.2d at 776 (emphasis in original; citations omitted). The Board's assertion that *Doctors' Hospital* was the genesis of its current test, Board Brief at 17-20, is therefore simply wrong.

The overwhelming weight of pre-1974 Board law establishes that the NLRB evaluated supervisory cases in the health care industry according the traditional indicia applicable to any other industry. No pre-1974 case even suggests that the Board should apply any higher level of "scrutiny," or undertake any investigation of "motive," when making supervisory status determinations in the health care industry. Nor does any case even permit

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fact, they were two separate episodes of litigation over the supervisory status of several classes of employees in the same hospital, arising from the same Board election. *Sherewood Enterprises, Inc.*, litigated the status of certain nurses before the Board election, and *Doctors' Hospital* litigated the status of other nurses after the same election. There is no "rule" to be drawn from the Board's holding in one case that one set of nurses' duties were truly supervisory and its holding in the other case involving a different set of nurses, with different responsibilities, were not.

[11] *NLRB v. Doctors' Hospital of Modesto, Inc.*, 489 F.2d 772 (9th Cir. 1973), *enforcing, Doctors' Hospital of Modesto, Inc.*, 193 NLRB 833 (1971). The 1971 *Doctors' Hospital of Modesto, Inc.*, case was the third episode of litigation to arise from the Board's failure to find nurses to be supervisors at that hospital. This case was an unfair labor practice proceeding regarding the employer's refusal to bargain with the Union, based, *inter alia*, on the Hospital's continued contention that the nurses at issue were supervisors.

the *inference* that activities "incidental to" or "in connection with" patient care should be outside the parameters of Section 2(11).[12]

The AHCA does not argue that nurses employed at nursing homes must be supervisors in every instance. The AHCA asserts that Section 2(11) must be applied to the health care industry and to nurses in the same manner as it is applied in any other case involving supervisory status in any other industry.

D. The Board's New Standard For Supervisory Status In The Health Care Industry Is Inconsistent With Congressional Intent And Makes It Virtually Impossible For Nurses To Be Deemed Supervisors

Shortly after the 1974 amendments, the Board began to apply gloss after gloss of "construction" on Section 2(11). The ultimate result has been the creation of an extra-statutory "rule" under which the Board deems non-supervisory any activity undertaken by nurses which has any impact on patient care. *See* pp. 5-6, *supra*. As applied, the Board's "patient care proviso" has resulted in nurses *not* being held supervisory while similarly situated individuals in other industries would be so found.

By 1978, the Board had begun its departure from the Congressional standard and developed a special legal rule for the

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[12] In several other pre-1974 cases, the Board found that nurses were not supervisors under the Act. However, the bases for these holdings had nothing to do with the higher level of scrutiny increasingly applied by the Board after 1974. In those cases, the Board based its finding on the simple absence of authority over employees, *Garden of Eden Nursing Home, Inc.*, 199 NLRB 16, 23 (1972), *overruled on other grounds, Madiera Nursing Center, Inc.*, 203 NLRB 323 (1973); *Jackson Manor Nursing Home*, 194 NLRB 892, 896 (1972), *overruled on other grounds, Madiera Nursing Center, Inc., supra*; or that the nurses used no independent judgment, *Madiera Nursing Center, Inc.*, 203 NLRB at 324, *Convalescent Center of Honolulu*, 180 NLRB 461 (1969), *New Fern Restorium Co.*, 175 NLRB 871 (1969), or that the nurses' direction of employees was routine. *Mountain Manor Nursing Home*, 204 NLRB 425, 426 (1973), *Leisure Hills Health Centers Inc.*, 203 NLRB 326 (1973), *Eugene Good Samaritan Center*, 191 NLRB 35, 39 (1971), *enf'd sub nom. NLRB v. Evangelical Lutheran Good Samaritan Society*, 477 F.2d 297 (9th Cir. 1973).

health care industry. In fact, one NLRB Administrative Law Judge ("ALJ") observed that

> In light of [the 1974 amendments' legislative history], *the Board has declined to accord supervisory status to nurses — in the face of evidence which in other types of situations might very well support a contrary conclusion, because such directives were incidental to an exercise of professional expertise.*

Turtle Creek Convalescent Centres, Inc., 235 NLRB 400, 402-403 (1978)(emphasis added; footnote excluded). The Judge then discussed the manifold ways the Board found to discount the otherwise-supervisory activities of nurses.[13]

[13] In support of this observation, ALJ Walter Maloney cited *Sutter Community Hospitals of Sacramento, Inc.*, 227 NLRB 181 (1976) (nurses wrote counseling memoranda or evaluations, maintained records, ordered supplies, and effectively recommended hiring); "[n]one of these factors, nor the aggregate thereof, were sufficient in the Board's view to remove the employees in question from the protection of the Act." *Turtle Creek Convalescent Centres*, 235 NLRB at 402; *Shadescrest Health Care Center*, 228 NLRB 1081 (1977); "Despite the fact that charge nurses were the highest ranking persons in the premises in the nursing unit during evenings and weekends, the Board felt that this factor was not sufficient to warrant a conclusion that charge nurses were supervisors . . ." *Turtle Creek Convalescent Centres*, 235 NLRB at 403; *Brattleboro Memorial Hospital, Inc.*, 226 NLRB 1036 (1976)(nurses evaluated employees, assigned work, adjusted grievances, authorized overtime, called in employees, issued written reprimands); "[t]he Board majority felt that all of these indicia of supervisory authority . . .did not add up to a conclusion that head nurses were supervisors within the meaning of the Act, since their judgments were made almost exclusively as a result of their professional capacity and incidental to the care of patients." *Turtle Creek Convalescent Centres*, 235 NLRB at 403; *Pinecrest Convalescent Home, Inc.*, 222 NLRB 13 (1976)(nurses were often highest ranking persons, called in employees, authorized employees to leave early); "[d]espite these factors, the Board stated that the charge nurses therein were employees . . ." *Turtle Creek Convalescent Centres*, 235 NLRB at 403; *Victor Valley Hospital*, 220 NLRB 977 (1975)(nurses assigned work, could give verbal reprimands, attended supervisory meetings, approved overtime, evaluated employees); "[h]owever, the Board felt that these powers were an outgrowth of their professional standing and not an indication of supervisory authority." *Turtle Creek Convalescent Centres*, 235 NLRB at 403; and *Oak*

(Footnote continued)

The Sixth Circuit identified the Board's "patient care proviso" in 1981. In *Beverly Enterprises v. NLRB*, 661 F.2d 1095 (6th Cir. 1981), the Sixth Circuit remanded a case to the Board because it appeared that nurses were denied supervisory status "simply because their supervisory activities in assigning and directing" employees were related to patient care. The Court correctly said "*this approach has no reasonable basis in the law.*" *Id.* at 1103. (emphasis added).

On remand, the Board paid lip service to the "straw boss" rationale, but ultimately ignored it. *Beverly Manor Convalescent Centers ("Beverly Manor I")*, 264 NLRB 966, (1982), *enf. denied*, 727 F.2d 591 (6th Cir. 1984). The Board said that Section 2(11) required *more* authority than actions fundamentally limited to patient care. 264 NLRB at 966-967. Moreover, said the Board, even though assignment and direction of employees *are* supervisory indicia under Section 2(11), if such activities are

Ridge Hospital of the United Methodist Church, 220 NLRB 49 (1975) (nurses were often the highest ranking persons in the facility, assigned and reassigned employees, could verbally correct employees who were guilty of misconduct); "[t]he Board found . . . that the occasional exercise of supervisory authority does not serve to transfer an employee into a supervisor . . ." *Turtle Creek Convalescent Centres*, at 403.

On appeal, the Board in *Turtle Creek Convalescent Centres* stridently *denied* that it applied different standards to nurses, 235 NLRB at 400, disavowing the notion that "the Board, in determining the supervisory status of health care professionals, applies standards which are different from the traditional standards for determining supervisory status." *Id.* The Board continued, citing its statement in *Sutter Community Hospitals of Sacramento, Inc.*, that "[i]n deciding whether health care professionals, including registered nurses, are supervisors within the meaning of the Act, *we are bound to adhere to the traditional standards for determining supervisory status.*" *Id. at n.3 (emphasis added).*

ALJ Maloney took the foregoing statement seriously when, in *Springfield Jewish Nursing Home for the Aged, Inc.*, 292 NLRB 1266 (1989) he applied the "traditional standards" to nurses. Specifically, he found the nurses' assignment and conveyance of employer policies to employees regarding patient care satisfied Section 2(11). *Id.* at 1272. However, the Board again reversed the Judge, holding, *inter alia*, that "assignment and direction" "regarding patient care does not confer supervisory status on a charge nurse." *Id.* at 1267.

incidental to patient care, they are *not* in the interest of the employer. *Id.*

The Board also departed from the statute by stating that a nurse's judgment need no longer be manifest in activities reflecting the *nurse's treatment of patients*, but merely in relation to the care of patients *generally*. The Board ultimately held that the nurses were not supervisors because their "judgments . . . primarily foster patient care and not the personnel policies of the employer." *Id.* at 968.

Dissatisfied, the Sixth Circuit again remanded the case, pointedly directing the Board to answer these questions: (1) do nurses exercise independent judgment when engaged in supervising employees? (2) If so, is such activity in the interest of the employer? *Beverly Enterprises v. NLRB*, 727 F.2d 591, 593 (6th Cir. 1984). The Board admitted that nurses' assignment and direction duties do utilize *independent judgment*. *Beverly Manor Convalescent Centers ("Beverly Manor II")*, 275 NLRB 943 (1985). At that point, the Board articulated the current two-step analysis that it employs to effectively preclude nurses from supervisory status. *See* pp. 5-6, *supra*.[14].

The *Beverly Manor* cases crystallized the Board's two-pronged attack on the potential supervisory status of nurses. The Board first imposes an extra-statutory hurdle for nurses (the "two-step analysis"). It then excludes from Section 2(11) any supervisory authority which results in an employee act which may be said to further patient care. This is neither the Act, nor application of the "straw boss" standard to health care.

In the aftermath of *Beverly Manor II*, the Board has extended this "patient care proviso" well beyond the assignment and

[14] The Sixth Circuit did not have an opportunity to comment on *Beverly Manor II*. However, shortly thereafter, the court reviewed another Board determination in which the Circuit unequivocally answered a question that the Board avoided in *Beverly Manor II*: "patient care" is the "interest" of a health care employer. *NLRB v. Beacon Light Christian Nursing Home* 825 F.2d 1076 (6th Cir. 1987).

direction of work. It has extended this analysis to all supervisory indicia under Section 2(11).

For example, in *Ohio Masonic Home, Inc.*, 295 NLRB 390 (1989), the Board characterized an employee's refusal of direction by a nurse as "causing potential danger to [a] patient." Thus, the nurse's *subsequent suspension* of the employee was dismissed as merely "incidental to the treatment of [a] patient." *Id.* at 394. The suspension for endangering a patient was deemed not to reflect "the interest of the Employer in enforcing personnel policy." *Id. See also, Phelps Community Medical Center*, 295 NLRB 486 (1989).

In *Waverly-Cedar Falls Health Care, Inc.*, 297 NLRB 390 (1989), *enf'd*, 933 F.2d 631 (1991), the Board held that "connection to patient care" is a factor which defeats any supervisory quality with respect to suspension of employees. 297 NLRB at 392-93. In fact, where the incident "could have affected the quality of patient care," the nurse's independent response could not be supervisory. *Id.* In *Beverly Enterprises-Pennsylvania, Inc.*, 303 NLRB No. 20 (1991), *enf. denied sub nom., Beverly California Corp. v. NLRB*, 970 F.2d 1548 (6th Cir. 1992), the Board held that nurses who 1) are in charge of a facility 75% of the time, 2) counsel and discipline employees, and 3) are directed by management to supervise and discipline employees, are *not* supervisors because all of those functions related to "patient care" concerns. *Beverly Enterprises-Pennsylvania, Inc.*, 6-RC-10518 (Decision and Direction of Election at pp. 10-16) (Nov. 16, 1990).

The Board's erosion of Section 2(11) as applied to nurses was manifest in its decision in *Riverchase Health Care Center*, 304 NLRB 861 (1991), *enf. denied sub nom. Beverly California Corp. v. NLRB*, Nos. 92-1068, 92-1205 (4th Cir. 1992) (unpublished opinion). There, the Board discounted almost every supervisory function of the LPNs by simply mentioning that each quality had some patient care impact, whether direct or indirect — and regardless of whether the care was administered by the *nurse* herself (as contemplated by Congress) or by employees pursuant to her supervision.

The *Riverchase Health Care Center* Board stated that the LPNs' *assignment and direction of work* was "primarily concerned with patient care." 304 NLRB at 864. Their elaborate and documented *disciplinary* responsibility did "not extend beyond the realm of patient care." *Id.* at 864-865. The *authorization of overtime* was "limited to considerations of routine patient care." *Id.* at 864. *Transfers of employees* were "directly motivated by the day-to-day requirements of patient care *rather than the business interests of the Employer*. . . ." *Id.* (emphasis added). LPNs' *adjustment of schedules* was to remedy situations "which affect patient care." *Id.* The *rescheduling of employee breaks* was merely "to ensure adequate staff is available to care for the patients." *Id.* at 863-864. *Releasing employees from work* was "consistent with the dictates of patient care." *Id.* at 864. The LPNs' *participation in the grievance process* was "motivated by patient care concerns." *Id.* at 865. Ultimately, the very management meetings attended by LPNs to *enhance their supervisory skills and promote compliance with their supervisory responsibilities* were dismissed as "meetings and training sessions where they discussed responsibilities and skills required to ensure patient care." *Id.*

In short, by uttering the words "patient care," the Board has eviscerated virtually every supervisory attribute possessed by a nurse.

Riverchase Health Care Center illustrates how far the Board's analysis has strayed from Congressional intent. It is the proverbial "absurd result" reached by taking the "patient care exclusion" to its "logical conclusion." Indeed, the conclusion appears inescapable that the Board has made a policy judgment that nurses *should* be unionized, or at least union-eligible.[15]

[15] Indeed, the Fourth Circuit has noted with approval one commentator's explanation for the rampant inconsistency in Board decisions regarding supervisory status:

> So manifest has this inconsistency been, that a commentator . . . aptly observed that "the Board has so inconsistently applied the

(Footnote continued)

Here, while asserting that it has conformed to congressional expectations, even the Board appears to acknowledge that it has created a new standard, beyond the traditional "straw boss" analysis. Under this standard, any direction or assignment of employees having anything to do with patient care is simply *disregarded*.

E. The Board Has Admitted - After Its Brief Herein Was Filed - That It Has Created A New Standard For Health Care And That This Standard Conflicts With Congress' 1974 Directive

The Board has stated and restated its various glosses, reinterpretations, and bases for the "patient care proviso" on so many occasions, that it is quite unclear what its position actually is. ALJ Maloney could not decipher the Board, nor could the Sixth Circuit. In a decision dated November 26, 1993, the Board issued a comprehensive restatement of the law on the "patient care proviso." *Northcrest Nursing Home*, 313 NLRB No. 54 (Nov. 26, 1993). In *Northcrest Nursing Home* the Board *admits* that it has *de facto* amended Section 2(11).

The Board continues to assert that it is applying the same statutory interpretation it used before 1974 - pursuant to the direction of Congress. *Northcrest Nursing Home*, 313 NLRB No.

> statutory definition" of supervisor as to cause one to speculate "that the pattern of Board decisions . . . displays an institutional or policy bias" . . . as illustrated by a practice of adopting that "definition of supervisor that most widens the coverage of the Act, the definition that maximizes both the number of unfair labor practices findings it makes and the number of unions it certifies."

NLRB v. St. Mary's Home, Inc., 690 F.2d 1062, 1067 (4th Cir. 1982), *citing* Note, *The NLRB and Supervisory Status: An Explanation Of Inconsistent Results*, 94 Harv. L. Rev. 1713, 1713-14, 1721 (1981). The Fourth Circuit's agreement with the above commentator prompted it to hold that *"courts must carefully scrutinize the Board's findings and the record on supervisory status."* *St. Mary's Home, Inc.*, 690 F.2d at 1067 (emphasis added). *See also Schnuck Markets, Inc. v. NLRB*, 961 F.2d 700, 704 (8th Cir. 1992); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983).

54, slip op. at 3. The Board then ignores that assertion by conceding that it "has utilized the 'patient care' analysis" only "since 1974." *Id.* (emphasis added).

Moreover, the Board today *admits* that:

> Prior to the 1974 Health Care amendments, the Board had found supervisory status based on assignment and direction in *Avon Convalescent Center*, and *Rockville Nursing Center*. Charge nurses in these cases were found supervisory because they utilized their professional judgment in assigning and directing other employees. These cases are not consistent with the Board's current holdings which do not find supervisory status on this basis. Accordingly, these cases are *overruled*.

313 NLRB No. 54, slip op. at n.12 (emphasis added, citations omitted).[16]

The significance of this passage cannot be overstated. Congress reviewed the state of Board decisional law in 1974 when it decided *not* to change the Act's definition of supervisor. Congress specifically expressed its *agreement* with the mode of analysis employed by the Board up until that time. It further directed the Board to *continue* to evaluate the cases in the same manner. *See* pp. 6-7, *supra*.

Now, while professing adherence to congressional intent, the Board in *Northcrest* says that the very decisions to which Congress directed it to adhere in the aftermath of the Health Care Amendments are *wrong!* Such sleight-of-hand abrogates any

[16] The Board presently attempts to repair this blatantly *ultra vires* interpretation by re-characterizing its past decisions, stating that its "imprecise" use of "terminology" only made it *appear* that it rejected discipline, or other overtly supervisory qualities simply by applying the appellation "patient care." 313 NLRB No. 54, slip op. at 4, 8. The Board now re-writes these cases, telling us that the "real reason" such individuals were not held to be supervisors is some reason other than what it expressly held in those cases. *Id.* at 4.

claim that the Board's interpretation of the Act is entitled to judicial deference. It also shows that the Board's "patient care proviso" has no basis in law.

Congress directed the Board to *apply* the law of these cases, not to *overrule* them.[17]

F. Nothing In Section 2(12) Of The Act Alters The Supervisory Standards Of Section 2(11)

The Board relies heavily on Section 2(12) of the Act to buttress its claims. Section 2(12), passed along with Section 2(11) in 1947, sets forth a definition of "professional employees." This is a true diversionary tactic, for the *LPNs* at issue in this case — and most other nursing home cases — are *technical, not* "professional" employees under the statute. (*Registered nurses* are "professional employees" within the meaning of Section 2(12).) *See* pp. 22-23, *infra*.

Even if professional employees *were* at issue here, no serious contention may be made that the statutory definitions of "supervisor" and "professional" are mutually exclusive. Standing alone, an individual's possession of professional qualifications simply cannot mean that he or she *may not*, as a matter of law, *also* have supervisory authority with respect to subordinate employees. While individuals who are not professionals may indeed be statutory supervisors, there is no basis whatever for the inescapable conclusion of the Board's and ANA's logic — *i.e.*,

[17] The *Northcrest Nursing Center* Board also argues that because nurses promote the interests of the *patient* in quality care, there will "seldom" be any "risk" of conflicting loyalties on the part of the nurses between the interests of the "employees" and the employer. 313 NLRB No. 54, slip op at 3. Among other things, this ignores the reality of union activity in the health care industry. Unions have loudly argued on behalf of their own "patient care" agenda, urging, for instance, increased staffing. It is not difficult to envision a supervising nurse placing a union's interest above the employer's, by not exercising his or her supervisory authority to compel employees to satisfy the work standards established by the employer, and thereby attempting to compel the employer to increase staffing.

that it is *easier* for *non*-professional employees to satisfy the Act's definition of supervisor than it is for professional employees.[18]

Indeed, the short answer to the "professional"/ "supervisor" issue raised by the Board and ANA was given by this Court in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). In *Yeshiva*, this Court stated that "professionals, like other employees, may be exempted from coverage under the Act's exclusion for 'supervisors.'" 444 U.S. at 681-682. *Yeshiva* contained no statement or even implication that some test other than the traditional "straw boss" analysis should be applied in the context of putative supervisors who happen to be professionals.

1. The Nurses At Issue Below Are Not "Professional Employees"

As noted, the Board has long held that LPNs such as these at issue here, 987 F.2d 1256, 1258-59 are not "professionals," *Mountain Manor Nursing Home*, 204 NLRB at 426, and are at most, "technical" employees, *not* "professionals." *Barnert Memorial Hospital Center*, 217 NLRB 775 (1975). Much of the Board's argument — and indeed *all* of the pertinent directives of Congress cited by the Board and *amici* herein — concern only *professional* employees. When confronted with this inconvenient fact in the past, the Board simply *ignored* the distinction by stating that the judgments made by "technical" employees were "similar" to those made by "professionals." *Beverly Manor I*, 264 at 966 n.4 (1982). This assessment has absolutely no statutory basis. Moreover, the Board's facile inclusion of LPNs as "professional employees" is directly contrary to congressional intent.

[18] The Board's contention that Section 2(12) limits the application of Section 2(11) is also directly contrary to the expressed intent of Congress. Indeed, the Senate Report describes as the "significance" of Section 2(12) its relation to "section 9 [29 U.S.C. 159] which is amended by the committee bill to require separate voting units of professional employees." S.Rep. No. 105, 80th Cong., 1st Sess. 19 (1947). There is *no* mention of Section 2(12) acting as a restraint of any kind on the definition of "supervisor." The separate definition of "professional employees" was clearly intended to provide such employees with the opportunity to be grouped into their *own bargaining units, separate* from non-professional employees. 29 U.S.C. 159(b)(1).

The Senate Report states that "the committee was careful in framing a definition to cover only *strictly* professional groups such as engineers, chemists, scientists, architects, and nurses." S.Rep. No. 105, 80th Cong., 1st Sess. 19 (1947) (emphasis added).[19]

2. This Court Never Approved The "Patient Care Proviso" Test Asserted By The NLRB

The Board incorrectly argues today that a footnote in an opinion of this Court concerning university faculty members gives the Court's *imprimatur* to the Board's "patient care" test. In *Yeshiva, supra*, this Court held that "[t]he Board has recognized that employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage [of the Act]." 444 U.S. at 690. In an accompanying footnote, this Court cited five Board cases (including *Doctors' Hospital of Modesto, Inc., supra*), each involving "lead men" or "straw bosses", who *failed to meet the Section 2(11) criteria*.[20] The Court then stated that "in the health care context" this is "a test Congress expressly approved in 1974." 444 U.S. at 690, n.30.

Yeshiva's approval of the traditional "straw boss" analysis in the context of professional employees cannot remotely be

[19] In the current *Northcrest Nursing Home* case, the Board explains that LPNs are "at least sub-professionals", 313 NLRB No. 54, slip op. at n.10, *citing NLRB v. Res-Care, Inc.*, 705 F.2d at 1466, an admission, at the least, that LPNs are *not* "professionals." In *Park Manor Care Center Inc.*, 305 NLRB 872 (1991), the Board clearly distinguished LPNs as "technical" and not professional employees. The Board slurs together the "professional" RNs and the "technical" LPNs by the glib conclusion that they both utilize "independent judgment." *Northcrest Nursing Home*, 313 NLRB No. 54, slip op. at 2. The Board decided to treat non-professionals as though they *were* professionals — for purposes of union eligibility, at least. *Id.* at n.10. There is no statutory support for such action.

[20] The Court cited *General Dynamics Corp.*, 213 NLRB 851 (1974)(project leaders akin to "leadmen"); *Wurster, Bernardi, & Emmons, Inc.*, 192 NLRB 1049 (1971) (architects working on finite projects); *Skidmore, Owings & Merrill*, 192 NLRB 920 (1971)(project managers and job captains working on specific assignments); *National Broadcasting Co.*, 160 NLRB 1440 (1966) (broadcast newswriters only have writing authority).

construed as approving the Board's higher threshold test, *see Beverly Manor II*, *supra*, which the Board denied even existed until 1982.

G. The ANA, Today And In 1974, Asserted Arguments Which Are Irrelevant To The Nursing Home Industry

The ANA makes repeated assertions about the plight of registered nurses in hospitals. This case does not involve registered nurses or hospitals. It concerns LPNs in a nursing home, like many of the thousands of homes operated by AHCA members.

Hospitals and nursing homes do not function in the same manner. At the Home in the case below, there are up to 11 nurses (RN and/or LPN) in the nursing department, and as many as 55 nurses' aides. In a hospital, there are usually many more *nurses* than there are aides. Supervision in a hospital is provided by various strata of nurses above the level of the rank-and-file nurse. On an organization chart, the nurse in a hospital might be the equivalent of the aide in a nursing home. By contrast, in a nursing home like the one at bar, the nurses provide a necessary – often the *only* – level of supervision available.[21]

The ANA argues that if the Sixth Circuit is correct, virtually all registered nurses in hospitals and other health care facilities would be covered by Section 2(11). ANA Brief at 3. This is incorrect. The response to this contention is the same as was given by Congress in 1974: the issue should be decided on a *case-by-case basis*, in light of the clear statutory mandate that is applied without fanfare in *every other industry*.

In sum, the ANA simply has never stopped lobbying for the proposed amendment to the Act that Congress declined in 1974

[21] The Board has taken pains to express the clear difference between hospitals and nursing homes, in terms of the services rendered, the patients served, staffing patterns, and organization. *Park Manor Care Center*, 305 NLRB at 874-876.

and the Board has since resurrected. Indeed, the ANA now asks this Court to judicially "enact" what it could not persuade Congress to legislate in 1974. Such action should be left to Congress.[22]

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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[22] The gravamen of the Brief of *amicus* AFL-CIO is that the Board was compelled by the legislative history of the Act to apply Section 2(11) in a manner consonant with the "straw boss" standard. We could not agree more. Unfortunately, for the reasons discussed above, that is *not* what the Board has done.

The AFL-CIO also asserts that "there is no formulaic answer to the question whether or not particular individuals are supervisors based on the direction of employees." AFL-CIO Brief at 28. The AHCA again agrees completely. However, the Board's approach to the nurse supervisor issue has resulted in a formulaic exclusion from the ambit of Section 2(11).